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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-238

NORTHERN NATURAL GAS COMPANY, ET AL.,
Petitioners,

VS.

MOBIL OIL CORPORATION, ET AL.,
Respondents,

AND

RALPH GROUNDS, ET AL.,
Respondents.

REPLY FOR PETITIONERS ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The briefs of the independent producers implicitly concede that petitioners' questions are important, far reaching and serious, since their attempt to gloss over these questions rests on an improper and invalid construction of the Helium Act Amendments of 1960, and usages that Congress could not have intended to make relevant. Accordingly, they say that "the plain wording of §11 of the Helium Act (sic) is all-inclusive in making the Natural

Gas Act inapplicable to commingled helium. It does not limit the nonapplicability of the Natural Gas Act to sales of commingled helium only when the pipeline companies choose to make separate contracts for helium, as they claim." (Br. in Opp., Ashland, et al., p. 11). Upon this fallacious premise, the independent producers purport to erect their case that this petition should not be granted. Within the narrow limitations of the reply brief format, we will show that the premise is invalid.

ARGUMENT

The Federal Power Commission, under the Natural Gas Act, Has Rate Jurisdiction Over the Sale of the Full Stream of Helium-Bearing Natural Gas, Including the Helium Constituent of Such Natural Gas Stream.

The problem confronting the independent producers in these cases is a difficult one. The gas purchase and sales contracts under which they sell and deliver natural gas to these petitioning pipeline companies cover, by their plain language, the full gas stream, including the helium constituent thereof. The district court so held, as did the Circuit Court (App. 26a-27a). This natural gas is "helium-bearing natural gas" as defined in the Helium Act Amendments (App. 212a-213a). If the Federal Power Commission rates cover the full helium-bearing natural gas stream at the point of sale from the independent producers to these petitioning pipeline companies, the independent producers cannot have any basis to be paid twice for the same sale of the same commodity in interstate commerce for resale, and the Court of Appeals erred in holding for the independent producers.

Recognizing this, the independent producers represent in their briefs on no less than sixty-five occasions that these

cases involve a commodity referred to as "commingled helium." This term is one invented[1] by the independent producers for interchangeable usage to mean on the one hand, the helium-bearing natural gas over the sale of which in interstate commerce for resale the Federal Power Commission retains jurisdiction, and on the other, and at the same time, the helium over the sale of which the Federal Power Commission never has jurisdiction.

By their wholesale use of the manufactured phrase "commingled helium" to ambiguously cover both sales, the independent producers have sought to confuse the Court and convey the impression that Congress intended to exempt the sale of helium-bearing natural gas from rate regulation under the Natural Gas Act. Nothing in the clear language or legislative history of either the Natural Gas Act[2] or the Helium Act Amendments permits any such non-symmetrical construction.

In the context of these cases there are two sales involved. *The first* of these *is a sale of helium-bearing natural gas* as defined in the Helium Act Amendments. The landowners lease their lands to the independent producers for the production of helium-bearing natural gas. The producers then produce such helium-bearing natural gas and sell and deliver such helium-bearing natural gas to petitioning natural gas pipelines in the field, on or near the leases where such helium-bearing natural gas is pro-

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1. Helium-gas mixture, and helium-bearing natural gas are defined in the Helium Act Amendments. The phrase "commingled helium" is neither defined in the Act nor even mentioned. Neither is there any record support for this terminology.

2. The Natural Gas Act, in marked contrast to the Interstate Commerce Act, evinces no purpose to abrogate private rate contracts as such. *United Gas Pipe Line Co. v. Mobile Gas Corp.*, 350 U.S. 332, 338-339.

duced, as a single homogenous commodity. It is this sale over which the Federal Power Commission retains jurisdiction.[3]

The second sale is that of helium. This sale takes place subsequent to, and, in many instances, far removed from, the sale and purchase of the helium-bearing natural gas on the lease sites, after gathering of the gas by the petitioning natural gas pipelines through a network of gathering lines, and after its transportation through large transmission lines in interstate commerce has commenced. It is covered by separate contract to which the independent producers are not parties. It is this second sale which is exempt.

By using the same phraseology to apply to both sales, the independent producers hope to persuade this Court that the second sale exemption applies equally to the first. But Federal Power Commission jurisdiction cannot be evaded so easily. The independent producers seek an exemption by judicial fiat where, over the years, they have never been able to obtain a legislative exemption. What Congress has joined, this Court should not so easily put asunder.

The sales by the independent producers to the petitioning pipelines are not separate sales of "commingled helium" or "helium" but are rather sales of "helium-bearing natural gas" unaffected by the Helium Act Amendments exempting the sale of helium from rate regulation under the Natural Gas Act. As the Eighth Circuit held:

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3. No services are performed by the independent producers for which they are not compensated under commission regulation. All costs of exploration, production, development, maintenance and operating are fully compensated in the regulated rates. *Permian Basin Area Rate Cases,* (1968) 390 U.S. 747.

"The court concludes that §11 states that the commission has no jurisdiction over the helium 'itself,' either while commingled with natural gas or after it has been extracted. Such exemption from the Natural Gas Act's operation, however, does not prevent the Commission from exercising jurisdiction over 'helium-bearing natural gas.' The statutory language and its legislative history compel this conclusion."[4]

CONCLUSION

As applied to the preexisting contracts between the producers and the pipeline companies for the purchase and sale of helium-bearing natural gas on a volumetric basis, the constitutional issues raised by the lower court's construction of the Natural Gas Act in conjunction with the Helium Act Amendments are both real and substantial. If the provisions of the Natural Gas Act *do* apply to the pricing provisions of such contracts, then the rate schedules control; if the provisions of the Natural Gas Act *do not* apply to the pricing provisions of such contracts, then the contracts control. The producers cannot have it both ways.

Absent any showing that the public objectives of the Natural Gas Act or the Helium Act Amendments require the appropriation of petitioners' contract rights for the private use and benefit of the independent producers under the circumstances of this case,[5] the holding by the Court below is both unreasonable and unconstitutional.

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4. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Com'n*, 359 F.2d 675, 679 (1966). It is hard to believe the independent producers are serious in asserting, as they do, that there is no conflict between the Eighth Circuit and the Tenth Circuit on the issue whether the presence of helium as a constituent of the natural gas stream affects rate regulation under the Natural Gas Act.

5. In all events, the Court of Appeals does not have jurisdiction to make such a determination. ". . . we have heretofore em-

For the reasons above stated, as well as those stated in the Petition for Certiorari, petitioners pray that the Petition for Certiorari be granted.

Respectfully submitted,

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phasized that Congress has entrusted the regulation of the natural gas industry to the informed judgment of the Commission, and not to the preferences of reviewing courts." *Permian Basin Area Rate Cases*, (1968) 390 U.S. 747, 767.